JD-73-17
R**ensselaer**, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GEORGE J. MARTIN & SON, INC.

and **Case 03-CA-188649**

MICHAEL DEORIO, an Individual

Caroline Wolkoff, Esq., for the General Counsel.
Aaron Harbeck, Esq, of Rensselaer, New York,
for the Respondent.
Michael DeOrio, for the Charging Party.

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on July 18, 2017, in Albany, New York. After the parties rested, I adjourned the hearing until August 9, 2017, when it resumed by telephone for oral argument. On August 10, 2017, I delivered a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] Following additional discussion, the remedy, order and notice provisions are set forth below.

Additional Discussion

Filing and Service of Charge

The Respondent's answer denied, for lack of knowledge, the allegations raised in complaint paragraph 1, that the Charging Party filed the unfair labor practice charge in this proceeding on November 23, 2017, and served it on the Respondent by mail the same date. However, the Respondent presented no evidence of irregularity in the filing and the service of the charge. Based on the affidavit of service and the absence of any evidence to the contrary, I apply the presumption of administrative regularity and find that the charge was filed and served as alleged.

[1] The bench decision appears in uncorrected form at pp. 248 through 256 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

Was DeOrio Singing on the Job?

In his testimony, Job Steward DeOrio described an encounter he had on September 23, 2015, with Aaron Harbeck, who is the Respondent's chief operating officer and also its legal counsel. Harbeck had come to the jobsite where DeOrio was supposed to be working and caught DeOrio wasting time. Harbeck reported the matter to General Foreman Stuart, who decided to remove DeOrio from the jobsite.

Harbeck served as the Respondent's counsel during the hearing and did not testify. However, DeOrio's own testimony establishes he was supposed to be working, but was not, at the time Harbeck saw him. A question arises as to exactly what DeOrio actually was doing.

Harbeck, in his role as the Respondent's attorney, cross-examined DeOrio concerning what DeOrio was doing on September 23, 2017, when Harbeck, in his role of chief operating officer, surprised him at the jobsite. DeOrio's testimony indicates that before Harbeck came into the room where DeOrio and an apprentice were standing, he spent some time outside the room eavesdropping and what Harbeck heard made him angry. The following is from Harbeck's cross-examination of DeOrio:

Q. When I came into the room and discussed what I had overheard --
A. Yes.

Q. you doing with your cell phone and talking with the apprentice, did you apologize for that?
A. I apologized for you being furious because you heard me singing a song and I would sing the "Circle of Life" to him again because I felt like it applied to exactly what we were doing, job related. Job related. Because I tried to speak to people on more than just the work, work, work level, but actually encompass everything.

As noted above, Harbeck did not testify. However, in his role as the Respondent's attorney, he did present oral argument, which included the following:

> The final straw was when I personally sat outside of an electric room where no work was being performed for three to five minutes listening in on a non-work conversation including jokes and what appeared to be Mr. DeOrio reading something off his phone. *At no time during this period did Mr. DeOrio start to sing the Circle of Life or any other song.* He was not discussing pipework or pathways as he testified. I entered the electric room and Mr. DeOrio, as he confirmed in his testimony, was leaning up against a transformer in a relaxed state. He continued to read off of his phone until he saw his apprentice look at me, at which time he turned around and apologized. I specifically asked him if he was using his phone for work purposes and he replied, "Negative." Mr. DeOrio's testimony regarding what was going on in that electric room is filled with lies. The only truth in his statement is that he

apologized and that he was leaning up against a transformer. [Italics added]

Thus, in oral argument, Harbeck denied that DeOrio and been singing and said that DeOrio's testimony was "full of lies." However, Harbeck was not giving testimony under oath as a witness but rather was presenting argument.

Moreover, the Union's assistant business representative, Paul Fitzmaurice, credibly testified that Harbeck, in a telephone conversation, had said that he had caught DeOrio singing.

DeOrio himself testified that he had been singing. Although I did not credit DeOrio's testimony which conflicted with that of General Foreman Joel Stuart, this particular testimony does not. Stuart was not present when Harbeck surprised DeOrio on the jobsite, and had no first-hand knowledge of what DeOrio was doing when Harbeck entered the room where DeOrio was working.

In sum, DeOrio's testimony that he had been singing is not contradicted by any other testimony. Therefore, crediting it, I find that he was singing right before Harbeck came into the room.

DeOrio's Discharge

Exactly what DeOrio was doing when he should have been working is not as important as the fact that it wasn't work. Harbeck reported that fact to General Foreman Stuart, who had had similar problems with DeOrio in the past. Stuart decided to oust DeOrio from this jobsite. Stuart possessed authority to take that action but did not have independent authority to discharge an employee.

After Stuart told DeOrio to leave the jobsite, DeOrio stopped by the break trailer and told the employees gathered there that he had been fired. DeOrio testified that he told these employees to contact the Union if they had any problems.

Stuart was not present when DeOrio spoke to other employees in the break trailer and only learned about it later that same day. The Respondent is the electrical subcontractor on the Rivers Casino project. In his work as the Respondent's general foreman, Stuart has frequent conversations with the general contractor's project manager, Ryan Faulkner. After Stuart told DeOrio to leave the project, he reported this action to Faulkner.

Faulkner told Stuart about DeOrio's statement to employees in the break trailer. After learning from Faulkner about this matter, Stuart also received information from some employees.

Based on Stuart's testimony, I conclude that Stuart believed DeOrio had asked the employees to contact the Union to protest his dismissal. Clearly, DeOrio's suggestion that employees contact the Union constitutes protected activity regardless of whether he told the employees to do so if they needed representation or to do so to protest his discharge.

On September 23, 2016, after Stuart told DeOrio to leave the jobsite but before DeOrio went to the break trailer and spoke to employees, Stuart had a telephone conversation with the Union's assistant business manager, Paul Fitzmaurice. Stuart informed the union representative that he was sending DeOrio home.

The record does not reveal Stuart's exact words to Fitzmaurice, but the assistant business manager formed the impression that Stuart was only suspending DeOrio and not discharging him. This conversation took place on Friday, September 23, 2016, before DeOrio had left the jobsite.

A little later that same day, Fitzmaurice, apparently believing that the matter had been resolved, telephoned DeOrio and told him to report for work that following Monday, September 26, 2016. However, at about the time of Fitzmaurice's call to DeOrio, Stuart learned about DeOrio's speech in the break trailer. That changed everything.

Stuart stated in a prehearing affidavit that after DeOrio "made those comments, I did not want him back on the job site in any circumstance and everyone at the employer I talked to about it agreed with me on that point."

When DeOrio arrived at the jobsite on Monday, September 23, 2016, Stuart would not let him work but sent him away. DeOrio testified that Stuart told him he was fired. Stuart testified that he did not recall exactly what he had said:

> Q. You told him at that time that he was fired, right?
> A. I told him —I don't know if I told him that, honestly. If I said I did there, then I might have, but I don't recall exactly what I told him. I just know that he wasn't supposed to be there. I was never called by anybody and told me he was coming back.

When DeOrio's testimony conflicts with Stuart's, I resolve such a conflict by crediting Stuart, whose testimony I believe more reliable. However, no such conflict exists here. In essence, DeOrio testified that Stuart said "you're fired" and Stuart testified he did not recall what he had said but that it was possible he told DeOrio he was discharged.

Accordingly, based on DeOrio's testimony, I find that Stuart told him that he was discharged. Therefore, I further find that the Respondent discharged DeOrio on September 26, 2016.

This conclusion is consistent with Stuart's explanation of what bothered him about DeOrio's speech to employees in the break trailer. As discussed further below, Stuart interpreted DeOrio's speech to employees as manifesting an attitude that "I can say whatever I want. I'm going to still keep my job."

The words "still keep my job" indicate that Stuart regarded DeOrio's willingness to speak out as incompatible with keeping his job. Someone who reached that conclusion would discharge the employee with the incompatible attitude rather than merely suspend him. Accordingly, I find that

the Respondent discharged DeOrio and that at least one of the reasons for the discharge was DeOrio's willingness to speak out, and, more specifically, to urge employees to contact the Union. Section 7 of the Act protects such speech.

As discussed in the bench decision, I analyze the facts using the framework which the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which is appropriate in mixed motive cases. Here, the Respondent had a lawful reason for taking some disciplinary action against DeOrio but, as Stuart's testimony establishes, it also had knowledge that DeOrio had engaged in protected activities.

Under *Wright Line* the General Counsel's initial showing must include evidence of antiunion animus as well as evidence of protected activity and employer knowledge of that activity. The present record is almost entirely bare of evidence of animus, except for Stuart's testimony, which the bench decision quotes. Had it not been for this testimony, I would have recommended dismissal of the complaint.

When asked whether he "might have calmed down and agreed to a suspension" of DeOrio if it had not been for DeOrio's comments to the other employees in the trailer, Stuart agreed, and then described why he considered those statements by DeOrio objectionable. Stuart began by saying that the "content of the comments is not important to me." As I understand Stuart's explanation, he took offense not at what DeOrio said but rather that DeOrio would have the temerity to speak to the other employees.

Thus, Stuart testified: "If you stand up and grandstand in front of a whole bunch of people, you've essentially made yourself a target or you've made yourself put —You've created a situation where you're going to overpower. I can do whatever I want. I can say whatever I want. I'm going to still keep my job."

Certainly, this testimony is somewhat disjointed and hard to follow. However, it appears clear that Stuart found objectionable DeOrio's assertiveness, his having the gall to "stand up and grandstand in front of a whole bunch of people." It concerned Stuart that DeOrio apparently believed that he could say whatever he wanted and still keep his job.

However, the Act clearly protects an employee's right to raise with other employees matters related to terms and conditions of employment, and to bring fellow employees' complaints to management. As an employee, DeOrio would have that right even if he were not a Union steward with responsibility to do so. In his role as job steward, DeOrio had not only the right but the duty to speak up on behalf of the employees.

DeOrio's remarks to other employees in the break trailer made obvious that he would not be a meek union steward but rather a vocal one. If he had the courage to "stand up and grandstand before a whole bunch of people," he likely would stand up to management and communicate the employees" concerns forcefully, without fear of losing his job.

Stuart revealed his concern about the forcefulness of DeOrio as job steward when he remarked that someone willing to stand up in front of a whole bunch of people is "going to overpower." If DeOrio remained at the jobsite, Stuart would have to deal with this overpowering union steward.

Significantly, when DeOrio demonstrated his assertiveness, he was engaged in protected activity, telling employees to contact the Union. He might well be similarly assertive when he spoke up for other employees.

Stuart's testimony leaves no doubt that he considered DeOrio's protected activity when he decided to ban him permanently from the jobsite. I find that the General Counsel has proven the existence of animus and has satisfied all of the initial *Wright Line* criteria.

The burden therefore shifted to the Respondent to show that it would have taken the same action against DeOrio in any event, even in the absence of his protected activity. It has not carried this burden.

A respondent can carry this burden with evidence that it has treated similarly situated employees the same way even though they had not engaged in protected activity. The Respondent did not produce such evidence.

However, it is not the law that an employer can prevail *only* by showing prior identical misconduct and discipline. *International Baking Co.*, 348 NLRB 1133 (2006). In this instance, though, I must conclude that the Respondent has not shown in any other way that it would have taken the same action against DeOrio if he had not engaged in protected activity.

After DeOrio's ouster from the jobsite that Stuart oversaw, the Respondent offered him work at another jobsite. This action shows that although DeOrio had been caught not doing his work, the Respondent did not consider that misconduct serious enough to disqualify him from further employment.

After DeOrio's employment at the other jobsite ended, work was still going on at the Rivers Casino site overseen by Stuart. Considering that animus was a substantial motivating factor in Stuart's decision to ban DeOrio from the jobsite, and considering that Stuart remained general foreman of this continuing project, I conclude that animus remained a substantial motivating factor in the Respondent's decision not to allow DeOrio to return to this project. The Respondent has not produced credible evidence of any other reason preventing his return to that jobsite.

Indeed, the Respondent's vice president, Brian Hart, testified that this Rivers Casino project "was behind schedule, man hours were doubled, if not tripled on this project and it was a concern that this thing had to run smoothly. We were very cautiously going forward." The fact that man hours had "doubled if not tripled" is consistent with a conclusion that work was available and that some

reason other than a lack of work prevented DeOrio's return. Hart's further testimony that "it was a concern that this thing had to run smoothly" suggests a reason for Respondent's failure to return DeOrio to the project: Am assertive steward could make the job go less smoothly.

The testimony of Respondent's, vice president, Hart, who made the decision not to return DeOrio to the casino project, supports this interpretation. Hart had conferred with the Respondent's general foreman on that project, Joel Stuart, who had banned DeOrio from the site and did not want him back. Hart testified: "I think Joel's position was just that, if we brought him back it would be more issues on the project that no one wanted."

For reasons discussed above, I have concluded that Stuart did not want DeOrio back on his project because DeOrio's protected activity in the break room—telling other employees to contact the Union—convinced Stuart that DeOrio would be an assertive job steward. Hart's testimony, that if the Respondent returned DeOrio to that jobsite "it would be more trouble on the project," is consistent with this interpretation.

Arguably, Hart's testimony could be interpreted to mean that they were concerned that if DeOrio returned he would waste time when he should have been working, but the words "more trouble" suggest sometime more serious.

Stated another way, the Respondent has not established a plausible nondiscriminatory reason for failing to return DeOrio to the project and the record raises more than a little suspicion that the reason was unlawful. Therefore, I conclude that the Respondent has not carried its rebuttal burden.

In sum, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging DeOrio on September 26, 2016. Thereafter, the Respondent offered DeOrio what amounted to interim employment at another jobsite. However, this was not substantially equivalent employment because DeOrio, who did not have a valid driver's license, had to rely on someone else to give him a ride. Accordingly, I conclude that the Respondent's offer of employment at the other jobsite did not constitute a valid offer of reinstatement sufficient to end the backpay period.

Meanwhile, work continued at the Rivers Casino jobsite. However, the Respondent failed to reinstate DeOrio to his former employment at this jobsite even after DeOrio's interim employment had ended.

In sum, and in view of my conclusion that the Respondent did not carry its rebuttal burden, I conclude that the Respondent unlawfully discharged DeOrio on September 26, 2016, and thereafter has unlawfully failed to reinstate him to his former employment.

Respondent's Affirmative Defenses

The Respondent's answer raises three affirmative defenses. First, the Respondent argues that the "matter has already been resolved and settled as per the Project Labor Agreement. . .the

Petitioner and Respondent had a working relationship, and further that both parties participated in the settlement, and Petitioner gained a benefit from such settlement."

After the Respondent's general foreman, Joel Stuart, banished DeOrio from the Rivers Casino project, the Union's business manager, Mark Lajeunesse, conferred with the Respondent's vice president, Brian Hart.[2]

They reached an agreement that DeOrio would be sent to work on another project. Once Hart made arrangements for DeOrio to ride with another employee to the project, DeOrio accepted the employment.

However, the record establishes that neither side addressed the unfair labor practice issue during the discussion leading to settlement and neither intended the settlement to resolve it. In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board established a new standard governing when it would defer to an arbitrator's award or to a grievance settlement.

Under this standard, the Board will defer to the settlement agreement only if the parties intended to resolve the unfair labor practice issue and only if the settlement addressed that issue. As noted above, the parties did not intend to resolve the unfair labor practice issue. No grievance raised this issue and the settlement did not address it. Therefore, I reject the Respondent's first affirmative defense.

As a second affirmative defense, the Respondent challenges the complaint allegation that general foreman Joel Stuart is a supervisor within the meaning of Section 2(11) of the Act. The bench decision explains my conclusion that Stuart is, in fact, a supervisor and that analysis need not be repeated here. However, it may be observed that Stuart's testimony indicates that there were about 80 electricians and some foreman under him at the Rivers Casino jobsite, the exact number varying over time. It is difficult to believe that the general foreman overseeing all of these workers only exercises authority of a routine or clerical nature, as the Respondent argues. For the reasons stated in the bench decision, I reject that argument and reject the Respondent's second affirmative defense as well.

As a third affirmative defensive, the Respondent states that "Mr. DeOrio was fired for cause after being observed on multiple occasions engaging in nonworking activities and thereby posing a health and safety risk, as well as influencing other employees (apprentices) to do the same. Mr. DeOrio has admitted to such behavior, agreed to correct his actions and was yet again found to be engaging in nonworking activities. Therefore he was fired for his actions and insubordination."

However, the *Wright Line* analysis establishes an unlawful motive and the Respondent has

2 In general, Hart's testimony accords with that of Lajeunesse. Based on my observations of the witnesses as they testified, I conclude that Lajeunesse's testimony is more reliable. Therefore, to the extent the testimony conflicts, I credit Lajeunesse.

failed to establish that the Respondent would have taken the same action in the absence of such protected activity. Moreover, the record fails to establish either that DeOrio was insubordinate or that the Respondent discharged him for insubordination. Therefore, I reject the Respondent's third affirmative defense.

The Respondent's Answer also seeks reimbursement for attorney fees, costs and expenses. Noting that the government has proven that the Respondent violated the Act, I deny that request.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

The Respondent must reinstate DeOrio to his former position, or, to a substantially equivalent position if his former position no longer is available. It also must make him whole, with interest, for all losses he suffered because of the Respondent's unlawful discrimination against him. The Respondent also must expunge from DeOrio's personnel file all references to the unlawful discharge.

Conclusions of Law

1. The Respondent, George J. Martin & Son, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Electrical Workers, Local 236 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employee Michael DeOrio on September 26, 2016, and by thereafter refusing to reinstate him.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, George J. Martin & Son, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its employees because they engaged in union or concerted activities protected by the Act.

(b) In any like or related manner interfering with, restraining, or employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Rensselaer, New York, and at its jobsites, copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 26, 2016. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(b) Within 14 days from the date of this Order, offer employee Michael DeOrio full reinstatement to his former position or, if his former position no longer is available, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and make him whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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4 If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD shall read POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Michael DeOrio and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 29, 2017

Keltner W. Locke
Administrative Law Judge

Appendix A

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that the Respondent discharged a job steward because of his Union and protected concerted activities, in violation of Section 8(a)(3) and (1) of the Act.

Procedural History

This case began on November 23, 2016, when Michael DeOrio, an individual, filed an unfair labor practice charge against the Respondent, George J. Martin & Son, Inc. with the National Labor Relations Board. The Buffalo Regional Office docketed this charge as Case 03–CA–188649.

After an investigation, the Regional Director for Region 3 of the Board issued a complaint and notice of hearing on March 20, 2017. In doing so, the Regional Director acted on behalf of and pursuant to authority delegated by the General Counsel of the Board. The Respondent filed a timely answer.

On July 18, 2017, a hearing opened before me in Albany, New York. The parties finished presenting evidence on that day, and I adjourned the hearing until August 9, 2017, when it resumed by telephone conference call for oral argument. The hearing then adjourned until now, August 10, 2017, for this bench decision.

Admitted Allegations

Based on the Respondent's answer and stipulations at hearing, I make the following findings:

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the International Brotherhood of Electrical Workers, Local 236 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times, the following individuals have been the Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Owner Brian Hart; Chief Operating Officer and Corporate Counsel Aaron Harbeck.

Supervisory Status of Joel Stuart

The complaint alleges, but the Respondent denies, that Joel Stuart is its supervisor and agent. Stuart is the Respondent's general foreman at the Rivers Casino project in Schenectady, New York. The Respondent is the electrical contractor on that project. Stuart credibly testified that, at its peak, 85 to 95 electricians worked for Respondent at this location. They reported to foremen who in turn reported to Stuart.

Stuart testified that he has the authority to direct employees at this project and does so when

problems develop. Because he exercises this authority in nonroutine situations to solve unusual problems, I conclude that this exercise of authority is not of a routine or clerical nature.

Stuart also has authority to send employees home and, in fact, exercised this authority when he told Charging Party DeOrio to leave the project on September 23, 2016.

He also effectively recommended that the Respondent not reemploy DeOrio at the Rivers Casino jobsite. In these circumstances, I conclude that Stuart meets the definition of supervisor in Section 2(11) of the Act. Further, I conclude that he is Respondent's agent within the meaning of Section 2(13) of the Act.

Credibility of Witnesses

Based on my observations of the witnesses, I conclude that the testimony given by Joel Stuart is reliable and credit it. Stuart testified carefully and responsively and I have considerable confidence in the accuracy of his testimony.

However, my observations of the witnesses do not lead to a similar conclusion concerning the testimony of DeOrio. A number of times during cross-examination, his answers did not seem responsive and it raised concerns in my mind that he was being evasive.

In particular, when Chief Operating Officer Harbeck saw DeOrio at the jobsite on September 23, 2016, DeOrio apologized to him. When asked why he apologized, DeOrio said it was because Harbeck was furious. However, DeOrio did not reveal until much later in the cross-examination that Harbeck was furious because he had caught DeOrio singing a song when he should have been working.

Throughout much of the cross-examination, DeOrio maintained that he was working when Harbeck approached. Even after admitting that he was in fact singing, DeOrio made at least some attempt to characterize the singing as part of his job duties. Although it is true that DeOrio was training an apprentice, I do not find that DeOrio singing a song, "The Circle of Life" imparted any electrical knowledge.

Accordingly, where DeOrio's testimony conflicts with Stuart's, I credit Stuart's.

The Unfair Labor Practice

After Harbeck caught DeOrio not performing his job, he reported it to General Foreman Stuart, who had warned DeOrio in the past not to be "goofing off" at work. Stuart testified that whenever he had given DeOrio these warnings in the past, DeOrio had admitted his transgression and promised to do better.

This time was, in a sense, the last straw, and Stuart decided he didn't want DeOrio to return to work on the project and told him to get his tools and leave.

Stuart then attended to other matters. Meanwhile, DeOrio stopped in the trailer where employees took their breaks and made a statement about having been fired.

Stuart's testimony concerning what DeOrio said is hearsay based on reports he heard from those who had been in the break trailer at the time. Although I do not credit it for the truth of what DeOrio actually said, I do find that Stuart believed that DeOrio had told those listening that he had been fired and that they should call the union hall to complain. The Union had appointed DeOrio to be a job steward and now the employees would not be able to use his services.

Stuart became upset because he believed DeOrio had lied about being fired instead of simply banished from this project. He also became upset that DeOrio had agitated the employees.

The following testimony is particularly significant to understanding what Stuart believed DeOrio had said and in understanding Stuart's reaction to it:

> Q. You would have calmed down otherwise except for those comments in the break trailer. We've read Paragraph 24, you might have calmed down and agreed to a suspension, right?
> A. That's not why he was fired.
>
> Q. That's not what I'm asking. You might have calmed down and agreed to a suspension except for those comments in the break trailer, right?
> A. Except for his actions in the break trailer.
>
> Q. I think you said comments.
> A. I said comments. The comments -- The content of the comments is not important to me. If you stand up and grandstand in front of a whole bunch of people, you've essentially made yourself a target or you've made yourself put -- You've created a situation where you're going to overpower. I can do whatever I want. I can say whatever I want. I'm going to still keep my job.

This testimony, particularly the last, indicates that Stuart did not wish employees to feel free to say whatever they want, that is, to discuss wages, hours and working conditions.

I will now analyze this situation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Analysis of whether an employer's action against employees violates Section 8(a)(3) of the Act is governed by *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as

an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB No. 014 (2007)

In this case, Stuart's testimony establishes all of the elements which the General Counsel must establish to carry the government's initial burden.

The burden then shifts to the Respondent to establish that it would have taken the same action against DeOrio in any event. However, the Respondent has not presented persuasive evidence that it had treated other similarly situated employees in the same manner. In other respects, it has failed to carry the burden of showing it would have acted in the same manner even in the absence of protected activities.

The Respondent did employ DeOrio at another jobsite, but that employment was of relatively short duration, and Respondent did not return DeOrio to the Rivers Casino jobsite when has employment at the other project ended.

I conclude that the government has proven that the Respondent discharged DeOrio in violation of Section 8(a)(3) and (1) as alleged in the complaint.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Appendix B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT discharge any employee because the employee told other employees to call the Union or because the employee engaged in any other union or concerted activity protected by the National Labor Relations Act.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Michael DeOrio full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael DeOrio whole for all losses of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Michael DeOrio and WE WILL, within 3 days thereafter, notify him that neither the warning nor the discharge will be used against him in any way.

GEORGE J. MARTIN & SON, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building, 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-188649 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (518) 419-6669.